Supreme Court, U.S.
FILED
98 828 NOV 18 1998
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

HOME BOY 2000, Petitioner,

-against-

GUESS?, INC.,
GUCCI AMERICA, INCORPORATED,
AND BIG TIME JEWELRY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HAROLD N. LEDERMAN
Counsel of Record
BRUCE H. LEDERMAN
On the Brief
Lederman Abrahams
Lederman & Zarett, LLP
Attorneys for Petitioner
567 Broadway
Massapequa, NY 11758
(516) 541-8900

60pp

QUESTIONS PRESENTED

Does a District Court Judge have any discretion, in the interests of justice, to modify the amount of damages awarded on a default judgment even though the Judge found that the default was negligent, or even deliberate, or is there a "hard and fast" or "bright-line" rule making it reversible error for the District Court judge to reduce the amount of a default judgment in the interest of justice after the defendant failed to respond to a motion for entry of default judgment?

Does the discretion of a District Court Judge to grant relief from a judgment under Fed. R. Civ. Pro. 60 allow him or her to give any consideration to the inequity posed by a default judgment, the amount of which is substantially higher than would have been awarded on the merits, if the District Court judge determines that the defendant "made a conscious decision to pay not attention [to the motion to enter default judgment] and not to seek legal advice, [but] the Court [was] satisfied that this was more a product of stupidity than of malice?"

PARTIES

The Court of Appeals decision for which review is sought consolidated appeals in two separate District Court actions, both of which were assigned to Hon. Lewis A. Kaplan, and dealt with as related cases even though no formal order of consolidation was entered at the District Court Level.

The parties in the case Gucci America, Inc. v. Gold Center Jewelry, Southern District Case Number 97-CV-1354, et al., are as follows:

Plaintiff:	Gucci America, Inc.,
Counsel:	Kalow Springut and Bressler 488 Madison Avenue New York, NY 10022 (212) 813-1600

Defendants Who Were Parties to the Second Circuit Appeal

	Home Boy 2000
Counsel:	Lederman Abrahams Lederman & Zarett, LLP 567 Broadway Massapequa, NY 11758 (516) 541-8900
	Big Time Jewelry
Counsel:	Noel W. Hauser and Associates 415 Madison Avenue New York, NY 10017 (212) 688-6400

Defendants Not Parties to Second Circuit Appeal:

Gold Center Jewelry
Gold Fortune Jewelry
Empire Jewelry

Gold "N" Ice
Gold Spot Jewelry
Golden Touch Bronx Corp.
Manny's Joyeria Jewelry
Oro-Uno Jewelry, Inc.
Senobar Jewelry
John Does 1-8

The parties in the case Guess?, Inc. v. Gold Center Jewelry, et al., Southern District Case Number 97-CV-1374, are as follows:

Plaintiff:	Guess?, Inc.,
Counsel:	Kalow Springut and Bressler 488 Madison Avenue New York, NY 10022 (212) 813-1600
Defendants Who Were Parties to the Second Circuit Appeal	
	Home Boy 2000
Counsel:	Lederman Abrahams Lederman & Zarett, LLP 567 Broadway Massapequa, NY 11758 (516) 541-8900
	Big Time Jewelry
Counsel:	Noel W. Hauser and Associates 415 Madison Avenue New York, NY 10017 (212) 688-6400
Defendants Not Parties to Second Circuit Appeal:	
	Gold Center Jewelry Gold Fortune Jewelry Empire Jewelry

Gold "N" Ice
Gold Spot Jewelry
Golden Touch Bronx Corp.
Manny's Joyeria Jewelry
Oro-Uno Jewelry, Inc.
Senobar Jewelry
John Does 1-8

Table of Content

Page

Question Presented for Review i

List of Parties to the Proceedings in the Court Below ii

Table of Contents vii

Table of Authorities viii

Opinions Below 1

Statement of Jurisdiction 1

Constitution and Statutory Provisions 1

Statement of Case 1

The Rulings Below 4

Reasons for Granting Writ 7

Conclusion 13

Appendix 14

A. Opinion of the United Stated Court of Appeals for the Second Circuit, Entered October 1, 1998 14

B. Opinion of the United States District Court for the Southern District of New York, of March 13, 1998, published at 997 F. Supp. 409 24

C. Opinion of the United States District Court for the Southern District of New York, of January 29, 1998, published at 997 F. Supp. 399 30

Table of Authorities

Cases:

Pioneer Inc. Services v. Brunswick, 507 U.S. 380, 113 S.Ct. 1489 (1993) 8, 9, 10

Robb v. Norfolk & Western Railway Co., 122 F.3d 354, 359 (7th Cir. 1997) 8

Thompson v. Kerr-McGee Refining Corp., 660 F.2d 1380 (10th Cir. 1981) 12

Rogers v. ITT Hartford, 178 F.R.D. 476, 483 (S.D. Miss (1997) 11

Statutes and Rules:

Fed. Rule Civ. Pro. 60(b) ..... 7 - 13

15 U.S.C. § 1117(c) 12

Treatises

Wright, Miller & Kane, Federal Practice and Procedure, Civil, Vol. 10A, § 2693 (1998) 12

Moore's Federal Practice 3rd, § 60.41[1][c][i] (1998) 10

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this matter on October 1, 1998.

OPINIONS BELOW

The October 1, 1998 opinion of the Court of Appeals whose judgment is sought to be reviewed is reported at ___ F.3rd ___ and is reprinted in the Appendix to this Petition at pp. 14. The prior opinions of the United States District Court for the Southern District of New York, dated January 29, 1998, and March 13, 1998, are published at 997 F. Supp. 399, and 997 F. Supp. 409, respectively, and are also reprinted in the Appendix at pp. 24 and 30.

JURISDICTION

The decision of Court of Appeals was entered on October 1, 1998. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION

F.R.C.P. 60 (b) provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representatives from a final judgment ... for any of the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect, ... (6) any other reason justifying relief from the operation of the judgment"

STATEMENT OF THE CASE

The fundamental question on this appeal is the extent, if any, of a District Court Judge's discretion to do justice in a particular situation where the District Court Judge found that a

defendant deliberately made a decision not to respond to a motion for entry of a default statutory damage judgment, but that this decision was the product of "stupidity rather than malice." The Second Circuit's decision holds that the District Court abused its discretion by granting equitable relief in the form of reducing the amount of the statutory damage judgment (without vacating the default itself) based upon the equitable consideration that the amount of the judgment was disproportionately high to the offense. As explained in the reasons for granting the writ, by stripping the District Court of any discretion whatsoever to consider the equities of the case, the Second Circuit created a split with authority in the Seventh Circuit, and also ignored important prior rulings by this Court as to the ability of trial judge to consider the equities in exercising discretion under Fed R. Civ. Pro. 60(b).

This appeal involves two separate, but substantively identical, trademark infringement actions commenced by Gucci America, Inc. and Guess?, Inc., against 11 unrelated small retail stores in Bronx County, New York, and eight (8) "John Does." Both cases were assigned to Hon. Lewis A. Kaplan. This petition for certiorari is filed solely on behalf of defendant Home Boy 2000, against which a judgment was entered in the Guess, Inc. action.

Defendant Home Boy 2000 is a small retail jewelry store located in the Bronx County, in the City of New York. The evidence in the record for the Guess case as against defendant Home Boy 2000 was that it sold a small number of 10 Karat gold charms, for $9.99, which bore counterfeit copies of Guess' registered trademark.

The summons and complaint was filed on February 26, 1997, and served on or about March 7, 1997.

A default was entered against Home Boy 2000 on May 7, 1997.

An omnibus motion (with in excess of 200 pages of supporting documentation) to set an amount of statutory damages at $25,000.00 against all of the eleven (11) defendants in this case, pursuant to the default, was served and filed on or about September 17, 1997. The cover page of plaintiff's 200 page motion was captioned "Gucci America, Inc. v. Gold Center Jewelry, et al.; Guess?, Inc. v. Gold Center Jewelry, et al.", and did not clearly indicate that relief was being sought against Home Boy 2000. In support of their claim for a $25,000.00 award, plaintiff suggested that each of the eleven (11) defendants earned a profit of at least $26,000.00 per six month period from the sale of infringing Guess merchandise.

Home Boy 2000 failed to respond to the omnibus motion and a default judgments of $25,000.00 were entered against it in the Gucci and Guess cases[1] on Oct. 21, 1998.

1

Subsequently, plaintiff realized that it never intended to seek a statutory damage award against Home Boy 2000 in the Gucci case, because there was no evidence that Home Boy 2000 had sold any Gucci merchandise after the effective date of the Statutory Damage Provisions of the Lanham Act. Counsel for Gucci stipulated to the vacatur of the Gucci judgment, although they vigorously pursued the Guess judgment. It was urged in the Second Circuit, and is urged once again, that the procedural confusion which resulted in an unrequested judgment being entered in the Gucci case was sufficient ground, standing alone, for the discretionary decision by Judge Kaplan to modify the Guess decision.

On December 23, 1997, plaintiff's counsel assisted by the United States Marshall appears at Home Boy 2000's store and executed upon the default judgment.

On December 31, 1997, defendant Home Boy 2000 filed an order to show cause with the District Court to vacate the default judgment. At the January 8, 1998 return date of the order to show cause, Hon. Lewis A. Kaplan heard oral argument of counsel and scheduled a hearing for January 16, 1998 with respect to the application to vacate the default, so that the testimony of the defendant's principal could be heard.

On January 16, 1998, Home Boy 2000's principal, Kevin Amirianfar, was questioned at length both by his own counsel and by Judge Kaplan. Additionally, plaintiff's counsel cross-examined Mr. Amirianfar at length.

THE RULINGS BELOW

The District Court ruled that although Home Boy 2000 physically received both the summons and complaint, and the motion to enter a $25,000.00 default judgment, the failure to respond was the product of "stupidity than of malice" on the part of Mr. Amirianfar. 997 F. Supp at 409. Judge Kaplan contrasted "stupidity" with "malice" to explain his factual determination that Mr. Amirianfar's failure to respond to the motion was not a deliberate tactical effort to frustrate the legal system, and was instead negligence born out of his lack of understanding of the legal system. In support of his findings, Judge Kaplan carefully reviewed the testimony of Mr. Amirianfar, an unsophisticated, immigrant shopkeeper, in a socio-economically depressed area of New York. The District

Court found that while it would not vacate the default itself[2], based upon the equities of the case, it was appropriate to reconsider the amount of the default judgment. Id.

Judge Kaplan found, after the hearing, that the "sales of counterfeit goods [by Home Boy] were not enormous because the business is a modest one[3]." 997 F. Supp. 411. Based upon the testimony of Mr. Amirianfar, and post hearing submissions, the District Court issued an order resettling the amount of statutory damages at $4,500, which the Court determined to be ten (10%) of the Home Boys 2000's gross annual income, plus an additional $3,500 for attorney's fees. The amount of the default judgment represented over half the defendant's annual gross income.

Judge Kaplan's decision also expressly recites that the reduced judgment was intended to be severe and reflect the "need for deterring even small retail operations conducted by persons who are neither wealthy nor sophisticated." 997 F. Supp. at 411-412. The modified judgment was clearly intended to be a severe penalty since the amount of merchandise infringing merchandise actually sold was small, but at the same time not a crippling penalty of over half of the defendant's

---

2

At the return date of the order to show cause to vacate the default, counsel for Home Boy 2000 stipulated that it was only seeking to vacate the amount of the judgment and not the underlying default on liability.

3

The only actual evidence in the record of the sale of counterfeit Guess merchandise was of the sale of a few 10 Karat charms for $9.99 each.

annual gross income. The modified judgment was likely a substantially greater judgment than would have been entered had Home Boy 2000 originally appeared rather than default, so that the policy of discouraging defaults, but preventing injustices, was fairly balanced.

The Court of Appeals reversed and directed reinstatement of the original $25,000.00 default judgment simply because the defendant admitted he had received the summons and complaint, and notice of motion for entry of default judgment. The Court of appeals found that since the "district court specifically found that Amirianfar and Zarrin made deliberate decisions not to respond to plaintiffs' damage application" the District Court erred as a matter of law in further considering whether the deliberate decision was made in bad faith and whether or not there was still some equitable basis for modifying the amount of the default judgment. Effectively, the Second Circuit's decision establishes a "hard and fast" or "bright-line" rule that if a default is deliberate, the District Court may not consider good faith or equitable factors and the judgment must stand, no matter how harsh or draconian.

REASONS FOR GRANTING THE WRIT

The Supreme Court has never issued a definitive decision determining whether a District Court judge has any discretion, and the extent of that discretion, under FRCP 60(b) to modify the amount of a default judgment if a defendant negligently, or even deliberately, failed to respond to a motion for a default judgment, but equitable factors nonetheless exist which warrant relief.

This case cries out for review by the Supreme Court under Supreme Court Rule 10 because (a) a split exists between the Second and Seventh Circuits, (b) the elimination of any discretion on the part of District Court constitutes a departure from the accepted and usual course of judicial proceedings, and (c) the Second Circuit's decision conflicts with important precedent from this Court as to the discretionary nature of the decision to vacate a default such that it is important for this Court to call for the exercise of this Court's supervisory powers.

The Second Circuit's decision effectively states that no matter how draconian and unfair a default judgment may be on the individual facts of a case, District Court judges cannot modify default judgments in the interests of justice if they find physical receipt of a summons and complaint and motion for entry of default, and a deliberate, but not bad faith, decision to default. While defaults should certainly not be encouraged, fundamental principles of fairness dictate that the accepted and usual course of judicial proceedings be that District Court judges deal with default judgments as discretionary matters. This case illustrates exactly how unsophisticated immigrants may not properly respond to complex legal papers for a variety of reasons, which can only be properly evaluated by a trial judge who listens to extremely fact specific testimony. Indeed, this case illustrates how behavior which may seem absolutely unforgivable on a cold printed record, may nonetheless be

forgivable when a District Court Judge actually hears and evaluates live testimony and cross-examination of someone steeped in a different culture. The important question which this Court should accept the case to address is that decisions, such as the one made by Judge Kaplan, are particularly discretionary matters which should not be subjected to reversal as a matter of law.

The Seventh Circuit, in Robb v. Norfolk & Western Railway Co., 122 F.3d 354, 359 (7th Cir. 1997), interpreted this Court's decision in Pioneer Inc. Services v. Brunswick, 507 U.S. 380, 113 S.Ct. 1489 (1993), as granting District Court judges "*discretion* to consider the equities and determine whether . . .[4] negligence is (or is not) excusable neglect." [Emphasis in original.] This Court's decision in the Pioneer case strongly indicates that the decision to vacate a default under Fed. R. Civ. Pro. 60 is particularly discretionary and that such discretion includes consideration of any inequity created by the default and resulting judgment, even if "a party may *choose* to miss a deadline." 507 U.S. at 388, 113 S. Ct. at 1394. In the case at bar, the Second Circuit took the exact opposite approach, holding that a determination that a deliberate decision to default precluded any consideration whatsoever of the good or bad faith underlying the decision to default or the overall equities attendant to the case.

---

[4] Robb involved a claim of attorney negligence. Since this Court has clearly stated that clients are held accountable for the acts or omissions of their attorneys, Pioneer, 507 U.S at 396, 113 S.Ct at 1499, the negligence of a pro se litigant should be judged by the same standard. Certainly, this Court should not want to create a standard under which District Court judges have discretion to excuse negligence by counsel but no discretion to grant the same relief to pro se litigants.

The Court of Appeals for the Second Circuit should not have imposed rigid requirements that prevent justice from being done in particular cases.

Fed. R. Civ. Pro. 60(b) grants a District Court wide discretion to relieve party from a final judgment "upon such terms as are just" for a variety of reasons, including "(1) mistake, inadvertence, surprise, or excusable neglect, ... (6) any other reason justifying relief from the operation of the judgment." This Court's decision in Pioneer, which was decided under Bankruptcy Rule 9006(b), holds that FRCP 60(b)(1) should be interpreted flexibly. The majority opinion in Pioneer explicitly rejects the dissent's call for a "'bright-line' rule of the sorts embraced by some Courts of Appeals, erecting a rigid barrier against late filings attributable in any degree to the movant's negligence." 507 U.S. at 396, 113 S.Ct. at 1498, n. 14. The Seventh Circuit's Robb decision accords broad discretion to the District Court, and expressly rejects any "hard and fast" rules eliminating discretion. The Second Circuit's decision effectively does the opposite by adopting a "hard and fast" and "bright-line" rule.

The lengthy and thoughtful decisions of District Court Judge Lewis A. Kaplan demonstrates a proper invocation of his discretion under Rule 60(b). Judge Kaplan's finding that the decision to default, was "more the product of stupidity than of malice" falls within the "range of possible explanations for a parties failure to comply with court-ordered deadlines" which this Court recognized in Pioneer.[5] Judge Kaplan's decision was

---

[5] In Pioneer the majority recognized that there is a spectrum of reasons a party may default, with acts of God at one end, and flouting a deadline at the other end. The Court stated that "in between lie cases where a party may *choose* to miss a deadline ... through inadvertence, miscalculation or negligence."

the result of listening to live testimony, and evaluating disputed issues of intent and credibility, which should not be second guessed at the appellate level. Indeed, it is submitted that Judge Kaplan's decisions demonstrate the type of careful evaluation of credibility, balancing of competing interests and fashioning of a remedy which will discourage future defaults, yet at the same time prevent injustice, which should be praised by this Court rather than reversed.

Research has not revealed a single case in which a District Court made a discretionary decision to reopen a case in the interest of justice, and was later reversed by a Court of Appeals for the simple reason that the defendant had physically received the summons and complaint and motion for entry of default judgment. Indeed, most cases decided at the Court of Appeals level involving default judgments generally involve affirmances by the Court of a refusal to vacate a default because it was intentional. The fact that a District Court judge will be affirmed on a discretionary decision not to vacate an intentional default does not mean that a District Court judge should be reversed in the rare instance where discretion is exercised to vacate an arguably intentional, or grossly negligent, default. Notably, Moore's Federal Practice 3rd, § 60.41[1][c][i] at 60-89, states that willful or deliberate conduct "mitigates against relief" but the treatise in no way indicates that such deliberate conduct absolutely precludes relief irrespective of any equitable

---

507 U.S. at 387-88, 113, S.Ct. at 1494. It is submitted that Judge Kaplan's finding of "stupidity" rather than "malice" was intended to illustrate that even though the default was deliberate, it still was not at the extreme end of the spectrum of defaults, so that the Judge felt justified in exercising discretion. In any event, even if the default was at the extreme end of the spectrum identified by this Court, the decision of whether to vacate the default still should be left to the discretion of the trial judge, and not be absolutely precluded as a matter of law.

considerations. The Seventh Circuit's decision in the Robb case ends with a clear instruction to District Court judges to exercise discretion sparingly in the case of defaults, but an acknowledgment that the language of Fed. R. Civ. Pro. 60, as interpreted by this Court in the Pioneer case, requires that the ultimate decision as to whether to vacate default be left to the discretion of the trial judge.

This case is important to the fair and efficient functioning of the Federal Court system, because it presents a clear case of a District Court judges recognizing that justice requires modification of a default judgment, only to be reversed by a Court of Appeals. Unless reversed, this case will become dangerous precedent unequivocally slamming the doors of justice in the face of potential litigants who may have an explanation warranting some equitable mercy from an unduly punitive default judgment (particularly in the context of a statutory damage award which by definition is discretionary).

Research indicates that no cases in this procedural posture have reached the Court of Appeals level, but it is submitted that such situations do present themselves at the District Court level, e.g. Rogers v. ITT Hartford, 178 F.R.D. 476, 483 (S.D. Miss (1997)(denying motion to vacate default judgment, but modifying amount of award). It is important that District Court judges understand that they have the discretion to do justice, even if they are instructed to exercise such discretion sparingly. The Second Circuit should not have stripped the District Court of such discretion completely. Any desire which the Second Circuit may have to clear calendars by rigidly enforcing standards for vacating default judgments is not an excuse for depriving a District Court judge of discretion which clearly exists under Rule 60(b), and which is the accepted and usual course of judicial proceedings. It is submitted that unless this Court exercises its supervisory powers to review this case, the Second Circuit's decision will become precedent preventing

District Court judges from properly exercising discretion to do justice.

Moreover, the Second Circuit's opinion conflicts in a general way with the well established law in every other Circuit which holding that a District Court, pursuant to Rule 60 has "a grand reservoir of equitable power to do justice in a particular case," as well as the hornbook principle that default judgments are disfavored. See Thompson v. Kerr-McGee Refining Corp., 660 F.2d 1380 (10th Cir. 1981) see generally Wright, Miller & Kane, Federal Practice and Procedure, Civil, Vol. 10A, § 2693 (1998)(Judicial Discretion in Setting Aside a Default).

Since Fed. R. Civ. Pro. 60(b) is at its heart designed to allow the District Court to fulfill the aims of justice, the decision of the Second Circuit, which eliminates the discretion of District Court judges, and conflicts with the discretion granted District Court judges in other Districts, should be reviewed and reversed[6].

6

Review by this Court is particularly appropriate because the recently enacted statutory damage provisions of the Lanham Act, 15 U.S.C. § 1117(c), empower the District Court to enter statutory damage awards for intentional trademark counterfeiting of between $500.00 and $1,000,000.00. This case illustrates how large, multi-national corporations, with substantial trademark enforcement judgments often commence federal actions against small immigrant retailers, who may not have the understanding or sophistication to properly respond to legal papers (particularly when the papers are several hundred pages thick), with the result that default judgments are often entered. While petitioner in no way intents to argue that intentional defaults should be encouraged, the issue to be reviewed is whether District Court Judges should be allowed discretion to consider reasonable penalties for arguably intentional, or grossly negligent, defaults

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Dated: November 11, 1998

LEDERMAN ABRAHAMS
LEDERMAN & ZARETT, LLP

By: _____
Harold N. Lederman
567 Broadway
Massapequa, NY 11758-5079
Tele: (516) 541-8900
Fax: (516) 541-9232

---

penalties for arguably intentional, or grossly negligent, defaults where a foolish failure to respond to complex legal papers results in a draconian penalty against an unsophisticated immigrant shopkeeper.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: July 15, 1998* Decided: September 30, 1998)

Docket Nos. 98-7642, 98-7644, 98-7726, 98-7728

GUCCI AMERICA, INCORPORATED, GUESS?, INC.,

Plaintiffs-Appellants-Cross-Appellees,

—v.—

GOLD CENTER JEWELRY, GOLD FORTUNE JEWELRY, EMPIRE JEWELRY, GOLD "N" ICE, GOLD SPOT JEWELRY, GOLDEN TOUCH BRONX CORP., MANNY'S JOYERIA JEWELRY, ORO-UNO JEWELRY, INC., SENOBAR JEWELRY, JOHN DOES 1-8,

Defendants,

HOME BOY 2000,

Defendant-Appellee,

BIG TIME JEWELRY,

Defendant-Appellee-Cross-Appellant.

---

* This case was heard pursuant to an order of the Chief Judge of the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 46(b), certifying a judicial emergency.

Before:

CABRANES and REAVLEY,* *Circuit Judges*,
and COVELLO,** *District Judge*.

Plaintiffs-appellants-cross-appellees Gucci America, Inc. and Guess?, Inc. appeal from judgments of the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*) vacating and reducing the monetary portion of default judgments previously entered in favor of defendant-appellee Home Boy 2000 and defendant-appellee-cross-appellant Big Time Jewelry. Appellants argue that the district court erred by construing Federal Rule of Civil Procedure 60(b)(1) to require a finding of bad faith as a predicate to a conclusion that a defendant defaulted "willfully."

Vacated and remanded.

MILTON SPRINGUT, Springut & Bressler, New York, NY (Robert Tilewick, on the brief), *for Appellants*.

BRUCE H. LENDERMAN, Lenderman Abrahams Lenderman and Zarett, LLP, Massapequa, NY, *for Appellee Home Boy 2000*.

NOEL W. HAUSER, Noel Hauser and Associates, New York, NY, *for Appellee Big Time Jewelry*.

---

* The Honorable Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

** The Honorable Alfred V. Covello, Chief Judge of the United States District Court for the District of Connecticut, sitting by designation.

ALFRED V. COVELLO, *District Judge**

This is an appeal from a decision of the United States District Court for the Southern District of New York, (Lewis A. Kaplan, *Judge*), vacating and reducing the monetary portions of default judgments previously entered in favor of the appellants, Gucci America, Inc. ("Gucci") and Guess?, Inc. ("Guess"). The appellants filed this appeal, arguing that the district court erred in reducing the amount of the original default judgments. The issue to be determined is whether the district court erred in setting aside default judgments based upon the notion that to have defaulted "willfully" for the purposes of our cases interpreting Federal Rule of Civil Procedure 60(b)(1), a defendant must have acted in bad faith. We reverse the decision of the district court and reinstate the original monetary award.

BACKGROUND

On February 26 and 27, 1997, Gucci and Guess sued the appellees, Home Boy 2000 ("Home Boy") and Big Time Jewelry ("Big Time"), for, *inter alia*, trademark infringement in violation of the Trademark Act of 1946, 15 U.S.C. § 1051, *et seq.*, as amended by the Anticounterfeiting Protection Act of 1996, Pub. L. No. 104-153. The complaints, which sought both damages and injunctive relief, alleged that Home Boy and Big Time were selling counterfeits of Gucci and Guess name brand products. Home Boy and Big Time failed to answer the complaints and, on May 6, 1997, the district court entered default judgments against them. In those default judgments, the district court granted the injunctive relief sought in the appellants' complaints and retained jurisdiction over the cases for the purpose of calculating damages.

---

* The Honorable Alfred V. Covello, Chief Judge of the United States District Court for the District of Connecticut, sitting by designation.

On September 17, 1997, Gucci and Guess filed their joint memorandum in support of an award of damages against the defaulting defendants. The memorandum indicated that Guess sought $25,000 in statutory damages from Home Boy and that each of the appellants sought $25,000 in statutory damages from Big Time.[1] Home Boy and Big Time received copies of the plaintiffs' memorandum, but failed to file a response.

On October 20, 1997, the court amended the default judgments, ordering Home Boy and Big Time individually to pay $25,000 in statutory damages to each of the appellants.[2] On December 30, 1997 and January 9, 1998, after Gucci and Guess had executed on the judgments, Home Boy and Big Time moved to vacate the default judgments against them pursuant to Federal Rule of Civil Procedure 60(b).[3]

On January 16, 1998, the district court held a hearing on Home Boy's application to vacate the monetary portion of the judgment against it. At the hearing, Keyvan Amirianfar ("Amirianfar"), the owner of Home Boy, testified that he had, in fact, received a copy of the complaint and the plaintiffs' application for damages and was aware that a lawsuit was pending against his company. *Gucci America, Inc. v. Gold Center Jewelry*, 997 F. Supp. 399, 408 (S.D.N.Y. 1998). Based on Amirianfar's testimony, the district court concluded that Amirianfar had "deliberately and wilfully defaulted in

---

1 Gucci did not seek statutory damages from Home Boy because the latter had not sold counterfeit Gucci goods after the effective date of the Anticounterfeiting Consumer Protection Act of 1996, which amended the Trademark Act of 1946 by authorizing the award of statutory damages.

2 To the extent that it ordered Home Boy to pay $25,000 to Gucci, the amended default judgment was in error. Pursuant to a stipulation of the parties, the district court subsequently corrected its mistake.

3 Although the district court originally denied these motions, it subsequently decided to reconsider the issue.

this action . . . . Although Amirianfar has not sought to reopen the default as to liability and injunctive relief, this finding would have led the Court to deny any such application." *Id.* However, the district court then went on to consider separately Amirianfar's failure to respond to the appellants' application for the award of statutory damages against Home Boy. On that issue, the district court concluded that

> Amirianfar was concededly served with the application for the entry of $25,000 judgments against Home Boy and ignored it. As a legal matter, he was on notice of the relief sought against him. Having considered [Amirianfar's] demeanor and all of the evidence in the case, however, the Court is not persuaded that his failure to respond to that application was the product of bad faith. And *while it was deliberate in the sense that Amirianfar made a conscious decision to pay no attention to it and not to seek legal advice*, the Court is satisfied that this was more a product of stupidity than of malice.

Id. at 109 (emphasis added). The district court thereafter vacated the monetary portion of the judgment against Home Boy and permitted it to file a memorandum on the issue of the amount of damages to be awarded.

In an opinion dated March 13, 1998, the district court concluded, after consideration of Home Boy's opposition, that the amount of damages to be awarded against Home Boy should be ten percent of its yearly profits. The court found Home Boy's yearly profits to be approximately $45,000 and, therefore, awarded damages against that defendant in the amount of $4,500. In addition, the court awarded attorney's fees in the amount of $3,500, for a total amended damages award against Home Boy of $8,000. *See Gucci America, Inc. v. Guess, Inc.*, 997 F. Supp. 409, 412 (S.D.N.Y. 1998).

With respect to Big Time, the court noted, in its January 29, 1998 opinion, that Big Time "acknowledge[d] that its default with respect to the complaint was knowing and deliberate." *Gucci America, Inc.*, 997 F. Supp. at 405. The district court also indicated that Big Time "[did] not deny having been served with plaintiffs' joint application for the imposition of statutory damages of $25,000 per trademark." *Id.* Nonetheless, the district court decided to grant Big Time a hearing on the issue of whether its failure to respond to the application for statutory damages was excusable.

On March 23, 1998, the district court held a hearing on Big Time's application to vacate the monetary portion of the judgments against it. At the hearing, Behzad Zarrin ("Zarrin"), the owner of Big Time, testified that he had received a copy of the complaint and that he had contacted an attorney shortly thereafter. He further testified that he was aware that his company was being sued, that he received the plaintiffs' brief on damages and that he was aware that the plaintiffs sought an award of damages. The court concluded that

> the question of whether the default with respect to monetary relief here was willful is a very close one, certainly in the sense that Mr. Zarrin knew that relief was being sought against him of a monetary nature and deliberately decided not to contest it. It was willful in that sense.
>
> On the other hand, I am not entirely persuaded that he acted in bad faith at that point. . . . [T]he notion that [Zarrin] advances—namely, that there was not really going to be a problem here as long as he was not selling counterfeit goods and that he stopped [selling them]—is not manifestly unreasonable on its face. So I think, as I say, it is a very close call.

The court vacated the monetary portion of the judgments against Big Time and set a briefing schedule with respect to

the issue of the amount of damages to be awarded. On April 10, 1998, after consideration of the parties briefs, the district court entered an order amending the amended judgments with respect to Big Time, to provide that each of the plaintiffs would recover monetary damages from Big Time in the amount of $7,500, which included $1,250 in attorneys' fees.

On May 6, 1998, Gucci and Guess filed this appeal, arguing that the district court erred in amending the monetary portions of the judgments. Big Time filed a cross appeal, arguing that the district court should have vacated the default judgments entered against Big Time in their entirety.

We reverse the order amending the amount of the judgments and remand to the district court for reinstatement of the original monetary awards against Home Boy and Big Time. The cross-appeal is dismissed.

DISCUSSION

"A 'district court's grant or denial of relief under Rule 60(b), unless rooted in an error or law, may be reversed only for abuse of discretion.' " *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272 (2d Cir. 1994) (quoting *Twelve John Does v. District if Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988)). We conclude that the decision here involved an error of law.

Federal Rule of Civil Procedure 60(b)(1) provides, in relevant part, as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; . . . On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . .

Fed. R. Civ. P. 60(b)(1). In considering a motion to vacate pursuant to rule 60(b)(1), in the default judgment context, "courts have gone beyond the bare wording of the rule and established certain criteria which should be considered in deciding whether the designated standards have been satisfied." *Brien v. Kullman Industries, Inc.*, 71 F.3d 1073, 1077 (2d Cir. 1995). In this circuit, it is well settled that those criteria are as follows: " '(1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the nondefaulting party if relief is granted.' " *American Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57, 59 (2d Cir. 1996) (quoting *Davis v. Musler*, 713 F.2d 907, 915 (2d Cir. 1983)).

On this appeal, we conclude that the district court was in error with respect to its assessment of the first element, that is, its conclusion that the defendants actions were not willful because they were not in bad faith.

In construing Rule 60(b)(1) as it did, the district court appears to have misinterpreted our decision in *American Alliance*. In that case, we held that a default caused by a filing mistake on the part of the defendant's in-house counsel was not "willful" for the purposes of our cases interpreting Rule 60(b)(1). *See id.* at 61. The rationale for our holding was that we "s[aw] no reason to expand this Court's willfulness standard to include careless or negligent errors in the default judgment context." *Id.*

In the course of our analysis in *American Alliance*, we observed that this Court "will look for bad faith, or at least something more than mere negligence, before rejecting a claim of excusable neglect based on an attorney's or a litigant's error." *Id.* at 60. We illustrated our point by contrasting two cases, one involving a negligent filing error (where we found excusable neglect) and the other involving a delib-

erate decision to default (where we found that the default was not excusable). *See id.* Later in the opinion, we further observed that the public interest in deterring abuses of process would be sufficiently served "by enforcing those defaults that arise from egregious or deliberate conduct." *Id.* at 61.

It seems to us clear that the analysis in *American Alliance* did not intend to suggest that a finding of bad faith is a necessary predicate to concluding that a defendant acted "willfully" for the purposes of Rule 60(b)(1). Instead, we merely sought to contrast defaults caused by negligence, which may in some cases be excusable, with defaults resulting from deliberate conduct, which are not excusable. *Cf. Securities and Exchange Commission v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998) (citing *American Alliance* for the proposition that, in the context of a default, "willfulness" refers to "conduct that is more than merely negligent or careless"). Thus, while a determination that the defendant acted in bad faith would certainly support a finding of "willfulness," it is sufficient that the defendant defaulted deliberately.

The evidence here demonstrates that Home Boy and Big Time, through their principals, Amirianfar and Zarrin, were served with the complaints and, subsequently, with the plaintiffs' joint application for damages. Amirianfar and Zarrin were both aware that a lawsuit was pending against them and, specifically, that Gucci and Guess sought damages of $25,000, per trademark violation, against their respective companies. Most significantly, the district court specifically found that Amirianfar and Zarrin made deliberate decisions not to respond to the plaintiffs' damages application.

Since the trial court here incorrectly required bad faith as a predicate to a determination of willfulness and since the record reflects that Home Boy and Big Time deliberately and

intentionally allowed default judgments to enter against them, we reverse and order reinstatement of the original monetary judgments. *See American Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57, 61 (2d Cir. 1996).

We have examined the remaining arguments of both Home Boy and Big Time, including Big Time's arguments on cross-appeal, and find them to be without merit.

CONCLUSION

For the foregoing reasons, we conclude that the district court erred in granting the motion to vacate the damages portion of the judgments and, with respect to that issue, the decision of the district court is hereby reversed. The case is remanded for the entry of the original monetary judgments against Home Boy and Big Time in the amounts of $25,000 and $50,000, respectively.

In all other respects, the decision of the district court is hereby affirmed.

997 F.Supp. 409, Guess?, Inc. v. Gold Center Jewelry, (S.D.N.Y. 1998)

*409 997 F.Supp. 409

GUESS?, INC., Plaintiff,
v.
GOLD CENTER JEWELRY, et al., Defendants.

No. 97 Civ. 1374(LAK).

United States District Court,

S.D. New York.

March 13, 1998.

Upon entry of default judgment in favor of trademark owner in action against jewelry store arising from sale of counterfeit goods, trademark owner moved to fix amount of statutory damages. The District Court, Kaplan, J., held that: (1) trademark owner was entitled to statutory damages in amount of $4,500, and (2) owner was entitled to attorney fees in amount of $3,500.

So ordered.

MEMORANDUM OPINION

KAPLAN, District Judge.

The history of this action is fully set forth in Gucci America, Inc. v. Gold Center Jewelry, (FN1) familiarity with which is assumed. The matter now is before the Court on the plaintiff's motion to fix the amount of statutory damages against defendant Home Boy 2000, against which the Court has entered a default judgment as to liability for wilful trademark infringement and counterfeiting.

Facts

Home Boy 2000 is a small retail jewelry store operated by JAF, Inc.

and its principal, Kevin Amirianfar. It is located in the Bronx.

On February 26, 1996, an investigator acting on behalf of plaintiff visited Home Boy and observed various medallions, earrings and bracelets bearing the "Guess?" trademark. On the following day, plaintiff's counsel sent a cease and desist letter to Home Boy. An investigator therefore returned to the store on June 6, 1996 and purchased two additional "Guess?" trademarked items. A third visit was made on January 28, 1997, at which time the defendant still was selling "Guess?" items, one of which was purchased by the investigator.

This action was commenced on or about February 27, 1997. The complaint alleges that this defendant wilfully sold counterfeit "Guess?" items and continued to do so after receiving plaintiff's demand that it cease and desist. (FN2) Defendant's default admitted these well pleaded factual allegations.

Mr. Amirianfar's conduct with respect to the litigation itself already has been described in the Gucci opinion. Suffice it to say here that Mr. Amirianfar's behavior was irresponsible and, to some degree, deliberately obstructive. (FN3) Moreover, the affidavit he submitted in support of the motion to vacate the monetary award previously entered against him was inaccurate in important respects.

At the hearing held on the motion to vacate and in a subsequent declaration, Mr. Amirianfar testified in substance that his dealings in counterfeit Guess? merchandise were de minimis. He contends also that he is a person of limited means and that any award should be no more than $3,500.

Discussion

Congress passed The Anticounterfeiting Consumer Protection Act of 1996 in an effort to counter the unprecedented escalation in trademark counterfeiting activities in this country. (FN4) Section 7 of the Act, (FN5) provides that:

"In a case involving the use of a counterfeit mark ... in connection with the sale, offering for sale, or distribution of goods and services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a) of this section, an award of statutory damages for any such use in connection with the sale, offering for sale, or distribution of goods or services in the amount of--

"(1) not less than $500 or more than $100,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just; or

"(2) if the court finds that the use of the counterfeit mark was willful, nor more than $1,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just."

The creation of this alternative to the more traditional damage remedies of recovery of the plaintiff's damages or the defendant's profits reflected a harsh reality--counterfeiters often do not keep or secrete records of their unlawful activities, thus making proof of the extent of the plaintiffs injury or the counterfeiters' profits impossible as a practical matter. (FN6)

The statute itself does not afford much guidance as to how the courts are to fix appropriate amounts in statutory damage cases. But there is an analogy--Section 504(c) of the Copyright Act (FN7) and its predecessor under the 1909 Act, both of which provide for awards of statutory damages for willful copyright infringement. Hence, cases decided under the Copyright Act, which deals with a similar problem and a similar legislative grant of discretion, afford guidance here. (FN8) And while there is no precise formula, even under the Copyright Act, for the determination of exactly what damages are just in a given case, the defendant's intent and the need to deter future violations are appropriate considerations along with the economic benefits and detriments to the plaintiff and defendant. (FN9)

In this case, defendant wilfully infringed the plaintiff's mark by selling counterfeit goods even after being warned not to do so. Indeed, he does not contend otherwise. While the Court accepts that his sales of counterfeit goods were not enormous because the business is a modest one, the Court has no confidence at all that they were as small as Mr. Amirianfar, whose credibility is subject to serious question in a number of respects, claimed. There is no way to determine the damage to plaintiff or the benefit to defendant, given the available credible evidence. Further, Mr. Amirianfar's conduct during the course of the litigation was entirely inappropriate. And there obviously is a need for deterring even small retail operations *412. conducted by persons who are neither wealthy nor sophisticated from dealing in counterfeit goods.

Mr. Amirianfar contends that his annual take home from the business is about $35,000. The Court infers that the figure is net of taxes, so that the annual profitability of the business, assuming arguendo the accuracy of Mr. Amirianfar's figure, probably is in the realm of $45,000. The Court finds that statutory damages of ten percent of that amount are appropriate here, taking into account the inability to determine the extent to which the defendant profited from its unlawful activities, the willfulness of its conduct, and the need to deter others from engaging in similar activities.

Accordingly, the Court fixes the statutory damages at $4,500.

Section 35(a) of the Trademark Act, as amended, (FN10) permits the court to award attorney's fees in "exceptional cases." "Usually, the type of conduct that has sufficed to make out an 'exceptional case' is intentional, deliberate or willful infringement." (FN11) Here, the willfulness of the infringement is established. Moreover, defendant's conduct with respect to the litigation has caused needless expense for the plaintiff and unnecessarily consumed a great deal of the Court's time. In consequence, an award of attorney's fees is appropriate. Taking into account the effort that plaintiff's counsel have devoted to the case, the value of such services in this market, the fact that judgment was obtained by default, plaintiff's means, and the award of statutory damages, the Court finds that a reasonable attorney's fee with respect to this defendant

is $3,500.

Conclusion

The Clerk shall amend the amended judgment in favor of plaintiff and against defendant Home Boy 2000 as follows:

1. The name of the defendant shall be changed from Home Boy 2000 to "JAF, Inc., d/b/a Home Boy 2000."

2. Plaintiff shall recover monetary damages and attorney's fees against the defendant in the total amount of $8,000.

SO ORDERED.

FN1. 997 F.Supp. 399 (S.D.N.Y.1998).

FN2. Cpt. pp 15-16, 21-22, 27.

FN3. 997 F.Supp. at 406-408.

FN4. See generally H.R.REP. NO. 556, 104th Cong., 2d Sess. (1996), reprinted in 1996 U.S.C.C.A.N. 1074 (1996); S.REP. NO. 177, 104th Cong., 2d Sess. (1995),1995 WL 709282 (1995).

FN5. 15 U.S.C. s 1117(c).

FN6. S.REP. NO. 177, 104th Cong., 2d Sess. (1995), 1995 WL 709282, at *11 (1995).

FN7. 17 U.S.C. s 504(c).

FN8. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION s 30:95, at 30-158 (4th ed.1997) (hereinafter MCCARTHY).

FN9. E.g., F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233, 73 S.Ct. 222, 97 L.Ed. 276 (1952); N.A.S. Import

Corp. v. Chenson Enter., Inc., 968 F.2d 250, 252-53 (2d Cir.1992); Fitzgerald Pub. Co. v. Baylor Pub. Co., 807 F.2d 1110, 1117 (2d Cir.1986).

FN10. 15 U.S.C. s 1117(a).

FN11. 4 MCCARTHY s 30:100, at 30-167 (collecting cases).

997 F.Supp. 399, Gucci America, Inc. v. Gold Center Jewelry, (S.D.N.Y. 1998)

*399 997 F.Supp. 399

GUCCI AMERICA, INC., Plaintiff,
v.
GOLD CENTER JEWELRY, et al., Defendants.
GUESS?, INC., Plaintiff,
v.
GOLD CENTER JEWELRY, et al., Defendants.

Nos. 97 Civ. 1354(LAK), 97 Civ. 1374(LAK).

United States District Court,
S.D. New York.

Jan. 29, 1998.

Manufacturers of trademarked goods sued jewelry stores for selling counterfeit merchandise after receiving cease and desist letters. On defendants' motions to vacate default judgments, the District Court, Kaplan, J., held that: (1) defaulting parties received adequate notice in plaintiffs' joint memorandum in support of entry of judgment for damages of trademark owners' intention to seek statutory damages for sale of counterfeited merchandise, even though complaint itself did not mention statutory damages; and (2) even though jewelry store owner deliberately and wilfully defaulted and deliberately obstructed progress of litigation by his actions at deposition ordered by court for calculation of damages, issue of amount of statutory damages, but not basic question of liability, had to be reopened.

Motions granted in part and denied in part.

MEMORANDUM OPINION

KAPLAN, District Judge.

Appendix C 30

These matters are before the Court on motions to vacate default judgments entered against many of the defendants on claims of violation of the Trademark Act of 1946 as amended by the Anticounterfeiting Consumer Protection Act of 1996 (the "1996 Act"). Briefly stated, the plaintiffs are manufacturers of trademarked goods marketed under the Gucci and Guess? brands. The defendants all appear to be retail jewelry stores doing business in the Bronx. Each is alleged to have sold counterfeit Gucci and Guess? merchandise even after agreeing to cease and desist from doing so. In view of the plethora of post-judgment applications, some of them repetitive, and two notices of appeal filed by counsel for a number of the defendants, it is essential to begin with a detailed summary of the course of proceedings in these cases.

I

Both actions were commenced in late February 1997. The complaints make similar allegations of trademark infringement and counterfeiting. Both sought damages and injunctive relief. The Gucci complaint named as defendants Gold Center Jewelry ("Gold Center"), Home Boy 2000 ("Home Boy"), Big Time Jewelry ("Big Time"), Gold Fortune Jewelry ("Gold Fortune") and John Does 1-8. The Guess complaint also named Gold Center, Home Boy, Big Time and twenty John Doe defendants. In addition, it named Empire Jewelry ("Empire"), Gold "N" Ice ("Gold"), Gold Spot Jewelry ("Gold Spot"), Golden Touch Bronx Corp. ("Golden Touch"), Manny's Joyeria Jewelry ("Manny's"), Oro-Uno Jewelry, Inc. ("Oro-Uno") and Senobar Jewelry ("Senobar"). Affidavits purportedly reflecting service on each of the defendants except Gold Fortune and the Does were filed in April 1997. (FN1)

The Default Judgments

With the exception of Gold Spot, which moved unsuccessfully to dismiss the Guess complaint pursuant to Rules 12(b)(4) and (5), none of the defendants appeared in either action. (FN2) In consequence, on May 6, 1997, the Court granted plaintiffs' applications for default judgments in both cases as to each of the defaulting defendants--Gold Center, Home Boy and Big Time in both cases and Empire, Gold, Golden Touch, Manny's, Oro-Uno and Senobar in the Guess case. The judgments

granted principally injunctive relief and retained jurisdiction to award damages, including statutory damages, as well as attorneys' fees and costs. In June 1997, the Court granted plaintiffs' applications for leave to conduct discovery against the defaulting defendants in order to enable plaintiffs to present their damages cases, and several of the defaulting defendants were deposed.

The Damage Awards

On September 17, 1997, the plaintiffs filed papers in support of applications for the entry of judgments for damages pursuant to Rule 55(b)(2). The applications specifically sought awards of statutory damages pursuant to the 1996 Act in the amount of $25,000 against each defaulting defendant in each case. Although the applications were served on each defaulting defendant, none appeared or filed any papers in response. By orders entered October 16, 1997, the Court granted the applications and directed the Clerk to modify the judgments previously entered to award $25,000 plus costs and attorneys' fees against each defaulting defendant in each case. The Court found that the defendants had engaged in deliberate and wilful counterfeiting, even after receiving cease and desist letters. The amount of damages, the Court concluded, was necessary to deter defendants from future infringing activities.

Amended judgments were filed on October 20, 1997.

The Applications to Vacate the Judgments

The first of the applications to vacate the default judgments was filed in the Guess case on behalf of Empire by the law firm of Tratner & Molloy on October 31, 1997. It argued that its default was excusable because it was the product of its principal's limited abilities in the English language. The Court, however, denied the motion because the record showed that Empire had retained Tratner & Molloy in June 1997, the firm represented it at a deposition conducted on June 30, and Empire offered no excuse for the lengthy delay in seeking relief from the judgment. (FN3)

The issuance of writs of execution prompted additional applications. On December 3, 1997, Gold Center, Golden Touch and Oro-Uno--all represented by Mr. Hauser--moved by orders to show cause to set aside the judgments against them, Gold Center in both cases and Golden Touch and Oro-Uno in the Guess case.

Gold Center argued in substance that it had assumed that plaintiffs would seek no relief against it by virtue of the Court's comment at a pretrial conference, attended by Gold Center's principal (in June 1997), that the matter probably would resolve itself if he cooperated with plaintiffs. He nonetheless admitted service of process, did not contest receipt after the conference of the application to award damages against him, and offered no other excuse for its default. The Court denied Gold Center's motion for failure to establish excusable neglect. (FN4)

Golden Touch denied having been served while Oro-Uno contended that it had been misled by plaintiffs' counsel. Following an evidentiary hearing on these two motions, the Court found that Golden Touch had not been served and that Oro-Uno had not been misled by plaintiffs' counsel. It vacated the judgment against Golden Touch and denied Oro-Uno's motion. (FN5)

Home Boy

On December 30, 1997, Home Boy, represented by the Lederman firm, moved in both cases by order to show cause to vacate the judgments against it. During argument on January 16, 1998, counsel for Home Boy indicated that it seeks to vacate only the award of money damages and an opportunity to litigate the amount that should be awarded. (FN6)

Gold and Senobar

On December 31, 1997, Mr. Hauser presented another order to show cause in the Guess case, this one seeking a temporary restraining order and vacatur of the judgments against Gold and Senobar. While the Court declined to issue the restraining order, (FN7) it made the motion to vacate returnable on January 9, 1998.

Big Time and Manny's

On January 9, 1998, Mr. Hauser appeared with still another order to show cause, this one captioned in both cases. The order itself sought a stay of all enforcement efforts and to bring on a motion to vacate the defaults as to Big Time (both cases) and Manny's (Guess case). The moving affidavit, however, sought to vacate the judgments against not only Big Time and Manny's, but also against Gold Center, Gold, Golden Touch, Oro-Uno (a/k/a A & D) and Senobar although the judgment against Golden Touch already had been vacated. (FN8) It argued, for the first time, that the monetary relief granted against the defendants exceeded in kind and amount that prayed in the complaint and therefore was impermissible under Rule 54(c). While the Court declined to issue the requested stay, it made the motion returnable on January 15, 1998.

The Appeals and Other Proceedings

Confusing matters still further, Mr. Hauser filed notices of appeal on January 9, 1998 in both cases. Each purports to appeal on behalf of "defendants"--although Mr. Hauser does not represent all of the defendants--from the judgments against the defendants and the orders refusing to vacate the default judgments. The appeals in the Gucci case, however, were dismissed on January 22, 1998 and the mandate filed in this Court on the following day.

On January 15, 1998, Guess?, Inc. stipulated with Gold, Manny's and Senobar to vacate the monetary provisions entered against them in the Guess case. Similarly, Gucci America, Inc. agreed to vacate the monetary provisions of the judgments entered against Home Boy in the Gucci case.

Finally, the Court held an evidentiary hearing on January 16, 1998 with respect to the Home Boy motions in both cases.

In summary then, the matters stand as follows:

1. The pending motions are as follows: (a) by Home Boy in the Guess case to vacate the damage award against it, (b) by Gold, Manny's and

Senobar to vacate the remaining nonmonetary portions of the judgments against them in the Guess case, and (c) if the Court regards the applications as properly before it, by Big Time, Gold Center and Oro-Uno to vacate the judgments against them, Big Time and Gold Center in both cases and Oro-Uno in Guess.

2. Absent relief from one or more of the default judgments, the Gucci case has been resolved as to all defendants.

3. The Guess case remains pending as to Golden Touch irrespective of the outcome of these motions, as the default judgment against it was vacated.

4. A notice of appeal of uncertain effect remains pending in the Guess case on behalf of unspecified defendants.

II

The starting point is to determine the effect of the pending notice of appeal on this Court's jurisdiction to decide the matters now before it in the Guess case.

In general, "the filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." (FN9) Rigid enforcement of such a mechanical rule, however, would ill serve the rule's objective of promoting efficiency by preventing two courts from addressing the same matter at the same time. (FN10) Moreover, it would deliver into the hands of each litigant the ability to freeze matters in the district court simply by filing a notice of appeal, no matter how frivolous. (FN11) In consequence, district courts are not deprived of jurisdiction by the filing of untimely or manifestly defective appeals and appeals from non-appealable orders. (FN12)

The notice of appeal did not transfer jurisdiction over the amended default judgment in the Guess case to the Court of Appeals. The amended default judgment was entered on October 20, 1997. The notice of appeal was not filed until January 9, 1998, considerably more than

thirty days thereafter. In consequence, insofar as the notice of appeal seeks review of the amended default judgment, it is untimely.

The notice seeks review also of unspecified subsequent orders declining to vacate the default judgments. But there are two additional problems.

First, the only defendants as to which the Court had denied motions to vacate on or before the date of the notice of appeal were Empire, Gold Center and Oro-Uno (a/k/a A & D Jewelry). The order denying the motion to vacate made on behalf of Empire was entered on November 17, 1997. The January 9, 1998 notice of appeal, even assuming that Mr. Hauser was authorized and intended to file it on Empire's behalf, was untimely insofar as Empire is concerned.

Second, Mr. Hauser does not represent Empire and lacked authority to file the notice on its behalf, assuming arguendo that it was his intention to do so.

Accordingly, the only orders denying motions to vacate that are the subjects of a timely, authorized and pending notice of appeal are the December 17 and December 29 orders denying the motions of Gold Center and Oro-Uno in the Guess case. (FN13) In consequence, the sole effect of the notices of appeal filed on January 9, 1998 is to preclude this Court from entertaining--insofar as it relates to Gold Center and Oro-Uno--Mr. Hauser's request, contained in the affidavit in support of his January 9, 1998 motion, that the default judgment in the Guess case be vacated on the ground that the relief granted exceeds that sought in the complaint and therefore ran afoul of Rule 54(c). (FN14)

III

Having thus cleared the underbrush, the Court turns first to that aspect of Mr. Hauser's January 9, 1998 application which seeks to vacate the judgments against Big Time in both cases and against Gold Center in the Gucci case on the ground that the relief granted exceeds that demanded in the complaint and therefore violates Rule 54(c). (FN15)

The complaints in these cases each alleged that the plaintiff had no adequate remedy at law and had been damaged in an undetermined amount believed to be in excess of $25.000. The prayers for relief sought, among other things, injunctive relief and "[t]hat defendants be required to account to *404 plaintiff Guess for all profits and damages resulting from defendants' respective infringing activities and that the award to plaintiff ... be increased as provided for under 15 U.S.C. 1117." The moving defendants argue that the complaints thus did not seek statutory damages and, in any case, that the awards of $25,000 in statutory damages against each defendant exceeded the amount prayed for in the demand for judgment. In consequence, they contend, the judgments violated Rule 54(c) and must be set aside.

Rule 54(c) of the Federal Rules of Civil Procedure states:

"A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

The rationale for the rule, insofar as it applies to default judgments, "is that default is tantamount to consent to the entry of judgment, but this consent is effective only to the extent that it was duly informed." (FN16)

In these cases, the only monetary relief sought in the complaints, even read generously in favor of the plaintiffs, was an accounting for defendants' profits and damages sustained by plaintiffs, "increased as provided for under 15 U.S.C. s 1117." The latter phrase obviously refers to Sections 1117(a) and (b), which permit courts to increase monetary awards to as much as treble the amount of plaintiff's actual damages or defendant's actual profits as established by the plaintiff. Nevertheless, the plaintiffs here elected, following the entry of default judgments as to liability and injunctive relief, to seek awards of statutory damages pursuant to Section 1117(c), which permits a prevailing plaintiff so electing to recover up to $1 million for willful use of each counterfeit mark per type of goods or services sold as an alternative to

actual damages or an accounting of the defendant's profits.

Statutory damages under Section 1117(c) are different in kind from actual damages or an accounting of the defendant's profits, most fundamentally because there is no necessary mathematical relationship between the size of such an award and the extent or profitability of the defendant's wrongful activities. Surely it cannot be said that even a defendant who deliberately elects to default in a suit seeking only actual damages or an accounting of profits, secure in the knowledge that no substantial award can be entered because the defendant's infringing sales were minimal, knowingly consents to the entry of an award of up to $1 million. In consequence, if these defendants simply had been served with the summonses and complaints and with nothing further prior to the award of statutory damages against them, the statutory damages awards could not stand in light of Rule 54(c). (FN17) These defendants, however, were not thus surprised. Each admittedly was served with plaintiffs' joint memorandum in support of entry of judgments for damages, which clearly elected to pursue statutory damages, rather than actual damages or an accounting of profits by the defaulting defendants. Indeed, page 1 of plaintiffs' memorandum explained that Section 7 of the 1996 Act (FN18) permitted imposition of damages of up to $1 million and "request[ed] that a judgment be entered against each of the defaulting defendants of $25,000 per infringing mark." Thus, anyone who gave a cursory reading even to the first page had to have known that judgments of $25,000 were sought by each plaintiff against each defaulting defendant. Yet none of the defaulting defendants responded to that application.

While Rule 54(c) must be enforced strictly in order to prevent the consent to the entry of judgment that is implicit in a default from being expanded beyond the defaulting party's intentions, there is no reason to permit it to be used as a shield when a defaulting party has full knowledge of the relief sought against it but nevertheless ignores the proceedings. As long as the defaulting party receives adequate notice of the relief sought and is afforded a meaningful opportunity to oppose it, the purpose of Rule 54(c) is served and any variance between the relief granted and that contained in the prayer for relief in the complaint is immaterial. (FN19) In Trans World Airlines, Inc. v. Hughes, (FN20) the

notorious case in which a $145 million default judgment was awarded against TWA based on the failure of Howard Hughes to appear for a deposition, for example, the Second Circuit affirmed against Rule 54(c) attack the district court's decision to permit amendment of the prayer for relief to increase the damages sought after the default occurred. (FN21) Although it did not discuss the point in detail, the decision clearly rested on the fact that TWA had a full opportunity to contest the amount of the damages following the amendment. Similarly, in Appleton Electric Co. v. Graves Truck Line, Inc., (FN22) the Seventh Circuit upheld default judgments that awarded relief that was not spelled out with precision in the complaints because the defendant had been served with a proposed default order which contained a formula that permitted the defendant to determine the amount of the judgments that would be entered against it. (FN23)

Big Time here admits that it was served with the summons and complaint and "with papers which I am now informed constituted the application of the plaintiffs for a default judgment." (FN24) It claims to have defaulted "upon the understanding that the plaintiffs were seeking an Injunction against our sale of merchandise which were counterfeit or spurious," (FN25) relief to which it did not object. Thus, it acknowledges that its default with respect to the complaint was knowing and deliberate. (FN26) Nor does it not deny having been served with plaintiffs' joint application for the imposition of statutory damages of $25,000 per trademark. But it contends that it never understood that the plaintiffs were seeking monetary damages. (FN27)

The situation of Gold Center is similar. Its principal admitted receipt of process and with "being familiar with the claims asserted." (FN28) Although the complaints clearly sought damages, albeit not statutory damages, he contended that, during the period from the commencement of the action through the June 1997 depositions conducted by plaintiffs, he "was under the impression that the plaintiffs were not seeking monetary relief." (FN29) He admitted also that he was served "with a voluminous set of legal documents" in September or October--the only documents meeting that description in the relevant time period being plaintiffs' joint application for awards of statutory damages--but claimed that he did not understand them. (FN30) Although he was sufficiently

curious to telephone plaintiffs' counsel, he did not reach them and, as far as the record discloses, never sought legal advice of his own. (FN31)

*406 In these circumstances, the Court holds that the monetary relief granted by the amended judgments is valid notwithstanding that it differs in kind from that referred to in the prayers for judgment in the complaints. The plaintiffs served each of the defaulting defendants with papers which very clearly explained that they were seeking statutory damages in the amount of $25,000 per trademark from each defendant. The defaulting defendants therefore were afforded notice and an opportunity to be heard with respect to the relief to be granted against them. In view of Trans World Airlines and Appleton, there is no Rule 54(c) infirmity in the judgments.

That is not the end of the matter, however. Although the issue has not been raised by counsel, the defaulting defendants' contentions that they did not understand the application for statutory damages that was served upon them raises the question whether relief should be granted from the monetary awards on the ground that their failure to respond was the product of mistake, inadvertence or excusable neglect. (FN32) This requires consideration of "(1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted." (FN33) Relevant too is the length of any delay between the default and the application for relief and the reasons for it. (FN34)

The Court assumes arguendo that each of these defendants has a meritorious defense with respect to the amount of statutory damages as that phrase has been defined by the Second Circuit. Each has made assertions in its affidavit that would "give the fact finder some determination to make." (FN35) While the plaintiffs would suffer some prejudice if the amount of statutory damages were reopened, the extent of that prejudice would be limited--and certainly far more limited than if the issue of liability were reopened. In consequence, the Court's judgment as to whether to vacate the monetary awards will depend significantly on its assessment of the credibility of the principals of Big Time and Gold Center. Accordingly, the Court will conduct an evidentiary hearing limited to the issue whether these defendants' failure

to respond to the joint application for the imposition of statutory damages was wilful. (FN36)

IV

Home Boy seeks only to vacate the awards of monetary relief. (FN37) In view of the stipulation by Gucci America to vacate the monetary relief procured on its behalf, the motion remains viable only to the extent it relates to the monetary award in favor of Guess?, Inc.

As indicated above, the factors relevant to the question whether to vacate the monetary portion of the default judgment against Home Boy: "(1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted." (FN38) In this case, Home Boy has a meritorious defense in the requisite sense--it is in a position to advance facts that were not previously before the Court that could be material to the determination of the appropriate amount of statutory damages. (FN39) *407 (FN39) Plaintiff is situated no differently with respect to prejudice were the amount of statutory damages against this defendant reopened than in the case of the defendants discussed above--there would be some prejudice, but not so much to preclude reopening in an otherwise appropriate case. Wilfulness, however, is a harder issue.

Home Boy actually is a name under which JAF, Inc.--a corporation wholly owned by Keyvan Amirianfar, who emigrated from Iran some years ago--conducts a small retail jewelry business at the corner of Fordham Road and Webster Avenue in the Bronx. (FN40) In order to place the motion to vacate in proper context, it is necessary to recapitulate the history of the lawsuit to the extent it relates to this defendant.

Home Boy was served with the summons and complaint, which were left in its store in Amirianfar's presence, on March 7, 1997. (FN41) The default judgment was entered on May 6, 1997. Home Boy was served with a notice of deposition, which was served pursuant to a court order the object of which was to afford plaintiff discovery on the issues of

damages in preparation for the inquest, in June 1997. (FN42) On June 25, 1998, Amirianfar appeared pursuant to the notice at the offices of plaintiff's counsel--thus demonstrating that he read the notice of deposition--but refused either to identify himself or be sworn. (FN43) When Amirianfar sought to turn the tables and question plaintiff's counsel, the following colloquy occurred:

"Q [Mr. O'Neill] I am asking the questions.

"A [Mr. Amirianfar] Don't push me. I am not going to lose, you are going to lose. I am not going to lose a penny.

"Q Similarly, if I don't understand your answers or your answers are incomplete I will ask you to explain them. The deposition of defendant Home Boy 2000 is being taken in Gucci Inc. versus Gold Center, et al., Civil Action 97 Civ. 1354.

"A David, I am leaving, I don't make a deal with you. Let the marshal come to my store.

"Q Let the record reflect that the deponent is refusing to testify in the category specified in the orders issued in Guess?, Inc. versus Gold Center Jewelry, 97 Civ. 1374 19. Date order for discovery dated June 9, 1997, signed by Louis [sic] A. Kaplan. And let the record also reflect that the deponent is refusing to testify in Gucci Inc. versus Gold Center Jewelry, 97 Civ. 1354 order for discovery signed by Louis [sic] A. Kaplan." (FN44)

The discussion continued in a similar vein for a few minutes, whereupon Amirianfar announced that he was "not going to pay a penny to the attorney" and, after being told that "there is an order entered in the case and [that] you are refusing to testify," told plaintiff's counsel to "shut up" and "[h]ave a nice day" and left. (FN45)

Amirianfar concededly was served in September 1997 with plaintiffs' application for the entry of $25,000 damage awards in favor of each of the plaintiffs against Home Boy. Nevertheless, he neither appeared nor answered in response to the motions. In the declaration submitted in

support of the motion to vacate the judgments, Amirianfar asserted that he never dealt in Guess or Gucci trademarked goods except in a few instances in which he had taken such merchandise in trade. He argued that the default had been excusable because he had assumed that the case was against only companies that were dealing in Gucci and Guess merchandise and that it did not pertain to *408 him. (FN46) To buttress this contention, he swore that he "never before had any experience with the legal system, and never been in any sort of trouble." (FN47) Indeed, in reference to the remarkable behavior relating to the deposition, he "absolutely den[ied] ever having gone to plaintiffs office and spoken with them about this case." (FN48)

At the evidentiary hearing on January 16, 1998, a somewhat different story emerged. Amirianfar first contended that legal papers had been delivered to him in his store, but that he saw the name "Gold Center" on them and put them aside without reading them because he "thought maybe it is nothing." (FN49) He acknowledged that he had received the notice of deposition and admitted that it had been he who had appeared at the offices of plaintiff's counsel on the occasion referred to above, an event he claimed to have forgotten at the time his declaration had been prepared. When he then was pressed about whether he had read the summons and complaint, he admitted that he had read enough to know that the document had come from the United States District Court, but claimed that he nevertheless decided not to read the balance. (FN50) Moreover, he subsequently acknowledged that he had learned from other local jewelry store owners even before he had gone to counsel's office in June 1997 that there were lawsuits about claims that the stores were selling counterfeit goods, although he claimed that one of the other store owners told him that "it's nothing." (FN51) Although he admitted receiving the plaintiffs' application to fix the monetary award against Home Boy, Amirianfar claimed that he did not understand that it sought money from him. (FN52)

The hearing established also that Amirianfar was not as naive as his declaration claimed. He admitted that he had been arrested in 1994 for selling stolen merchandise and that he had retained a lawyer on that occasion. (FN53) He had retained counsel also for the purpose of forming JAF, Inc., (FN54) and uses an accountant to prepare tax returns.

(FN55) It now is clear in this circuit that wilfulness for purposes of determining whether to vacate a default judgment refers to "deliberate default or bad faith on the part of the defaulting party." (FN56) The question whether Amirianfar's actions were wilful in this sense basically requires a judgment involving the Court's assessment of his credibility and the logic of the situation in which he found himself.

Amirianfar received the summons and complaint. He read the summons. Even if he did not read the complaint, he knew from the summons and his conversations with other store owners that Home Boy had been sued. He knew from his previous experience that he needed a lawyer, a fact confirmed by his protestation at the June 1997 deposition that he "was not going to pay a penny to the attorney." He knew, in short, that he was in peril of a default judgment if Home Boy did not take timely and appropriate action but nevertheless failed to act. Once the default judgment was entered, he appeared for the noticed deposition, thus demonstrating that his claims that he never read the legal papers are untrue at least in part. If his behavior on that occasion cannot be described as wilful and in bad faith, those terms have no meaning. Thus, the Court finds that Amirianfar deliberately and wilfully defaulted in this action and, moreover, deliberately obstructed its progress by his actions at the deposition. Although he has not sought to reopen the default as to liability and injunctive relief, this finding would have led the Court to deny any such application. But it is important to focus on the fact that he seeks only to open the question of the amount of statutory damages.

Amirianfar concededly was served with the application for the entry of $25,000 judgments against Home Boy and ignored it. As a legal matter, he was on notice of the relief sought against him. Having considered his demeanor and all of the evidence in the case, however, the Court is not persuaded that his failure to respond to that application was the product of bad faith. And while it was deliberate in the sense that Amirianfar made a conscious decision to pay no attention to it and not to seek legal advice, the Court is satisfied that this was more a product of stupidity than of malice. Accordingly, the monetary relief awarded against Home Boy in the Guess case is vacated and the issue of the amount of statutory damages to be awarded against Home Boy is

reopened.

V

Finally, the Court turns to consideration of the stipulations. As noted above, Gold, Manny's and Senobar each stipulated with Guess to vacate the monetary portion of the judgments against them. Still pending before this Court then is the motion of these defendants to vacate the non-monetary portion of the judgments against them in the Guess case. The only ground raised in support of the motion to vacate the defaults as to Gold, Manny's and Senobar is that the relief granted exceeds that demanded in the complaint and therefore violates Rule 54(c). This argument, however, goes only to the monetary portion of the judgments and therefore was mooted by the stipulation entered into between Guess and Gold, Manny's and Senobar. As there were no grounds articulated in the motion for vacating the non-monetary portions of the judgments against these defendants, any relief from the non-monetary portion of the judgments would be inappropriate.

Conclusion

For the foregoing reasons,

1. The Court will hold an evidentiary hearing on February 13, 1998 at 9:30 a.m. on the motions of (1) Big Time Jewelry to vacate so much of the amended judgments in both of these cases as awarded statutory damages against it, and (2) Gold Center Jewelry to vacate so much of the amended judgment in No. 97 Civ. 1354 as awarded statutory damages against it. In the event that the Court of Appeals remands No. 97 Civ. 1374 to this Court prior to that date, the hearing will also cover the motions of Gold Center Jewelry and Oro-Uno Jewelry to vacate so much of the amended judgment in that case as awarded statutory damages against them.

2. All further proceedings to enforce the monetary provisions of the judgments against Big Time Jewelry in both of these cases and against Gold Center Jewelry in No. 97 Civ. 1354 are stayed pending further order of the Court.

3. The motion of defendant Home Boy 2000 to vacate so much of the amended judgment in No. 97 Civ. 1374 as awarded statutory damages against it is granted. Said defendant shall file any papers in opposition to the plaintiff's motion for the imposition of damages in that case no later than February 13, 1998.

4. The motions of defendants Gold "N" Ice, Senobar Jewelry and Manny's Joyeria Jewelry, to the extent not resolved by the stipulation dated January 15, 1998, are denied.

SO ORDERED.

FN1. The actions were dismissed as to the Doe defendants and Gold Fortune for failure to make timely service by orders dated October 9, 1997.

FN2. The action against Gold Spot was resolved by the entry of a consent judgment dated January 15, 1998.

FN3. Order, Nov. 17, 1997 (Guess case).

FN4. Order, Dec. 17, 1997. It should be noted also that Gold Center's motion made no showing that it had a meritorious defense. The Court denied Gold Center's motion for reconsideration by order dated December 23, 1997.

FN5. Order, Dec. 29, 1997, Guess case; Tr., Dec. 29, 1997, Guess case, at 79-80 (Golden Touch), 83-88 (Oro-Uno [A & D Jewelry]).

FN6. Tr., Jan. 16, 1998, at 5.

FN7. Tr., Dec. 31, 1997, Guess case, at 2-4.

FN8. The judgment against Golden Touch was vacated on December 29, 1997.

FN9. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); United States v. Rodgers, 101 F.3d 247, 251 (2d Cir.1996).

FN10. See, e.g., Rodgers, 101 F.3d at 251.

FN11. See Leonhard v. United States, 633 F.2d 599, 609-11 (2d Cir.1980), cert. denied, 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981).

*409_ FN12. E.g., Griggs, 459 U.S. at 58 (non-appealable order); SEC v. American Bd. of Trade, 829 F.2d 341, 344 (2d Cir.1987), cert. denied sub nom. Economou v. SEC, 486 U.S. 1034, 108 S.Ct. 2018, 100 L.Ed.2d 605 (1988)(same); Leonhard, 633 F.2d at 610 (same); In re Grand Jury Proceedings, 795 F.2d 226, 231 (1st Cir.1986) (defective or untimely notice of appeal); United States v. Hitchmon, 587 F.2d 1357, 1360 (5th Cir.1979) (same); 20 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE s 303.32[2][b][iv] (3d ed.1997)
(hereinafter Moore's Federal Practice).

FN13. As a general matter, an order denying a motion to vacate a default judgment is final and therefore appealable. E.g., Welden v. Grace Line, Inc., 404 F.2d 76, 77 (2d Cir.1968); Weilbacher v. J.H. Winchester, 197 F.2d 303, 305 (2d Cir.1952).

FN14. E.g., New York v. NRC, 550 F.2d 745, 758-59 (2d Cir.1977) (district court may not reexamine or supplement the order or

judgment from which an appeal is pending).

FN15. The motion is made on behalf of Big Time (both cases), Gold Center (both cases), Gold (Guess case), Golden Touch (Guess case), Oro-Uno (Guess case), Manny's (Guess case) and Senobar (Guess case). As indicated above, insofar as the motion is made on behalf of Gold Center and Oro-Uno with respect to the Guess case, this Court is deprived of jurisdiction by the pendency of the appeal from the December 17 and 29 orders denying their motions to vacate. The entire judgment against Golden Touch was vacated prior to the filing of this motion. The monetary portions of the judgment in the Guess case against Gold. Manny's and Senobar were vacated by stipulation dated January 15, 1998. In consequence, the argument made in this aspect of the motion applies only to the judgments against Big Time and Gold Center (in both cases) and Oro-Uno (in Guess). As the Court lacks jurisdiction over the attacks on the judgments against Gold Center and Oro-Uno ill the Guess case by virtue of the pendency of their appeal, the only matters open for consideration here are the judgments against Big Time in both cases and the judgment against Gold Center in Gucci.

FN16. 10 MOORE'S FEDERAL PRACTICE s 54.71, at 54-127.

FN17. See, e.g., Compton v. Alton S.S. Co., 608 F.2d 96, 105-06 (4th Cir.1979) (no statutory penalty available on default where pleadings did not request such relief). Marina B. Creation S.A. v. de Maurier, 685 F.Supp. 910, 912-13 (S.D.N.Y.1988) (no trebling of patent damages on default where neither pleadings nor motion for default judgment mentioned such relief).

FN18. 15 U.S.C. s 1117(c).

FN19. 10 MOORE'S FEDERAL PRACTICE s 54.71[1], at 54-127-28.

FN20. 449 F.2d 51 (2d Cir.1971).

48

FN21. Id. at 56-57.

FN22. 635 F.2d 603 (7th Cir.1980).

FN23. Id. at 610-11. See also In re Dierschke, 975 F.2d 181, 185 (5th Cir.1992) (failure of complaint to request relief granted on default immaterial where defendant contested amount of award at inquest).

FN24. Zarrin Aff. pp 3, 5.

FN25. Id. p 7.

FN26. This admission, coupled with (a) the eight month delay between the entry of the default judgments as to liability and injunctive relief and the application to vacate the judgments and (b) the unfairness and needless expense that would be imposed on the plaintiffs at this late date if the issue of liability were reopened, is more than sufficient basis for declining to vacate those aspects of the default judgments regardless of whether this defendant has demonstrated the existence of a meritorious defense.

*409_ FN27. Zarrin Aff. pp 7-8.

FN28. Shvut Aff., Nov. 19, 1997, p 4.

FN29. Id. p 12.

FN30. Id. p 13.

FN31. Id.

FN32. FED.R.CIV.P. 60(b)(1).

FN33. American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57, 59 (2d Cir.1996) (quoting Davis v. Musler, 713 F.2d 907, 915 (2d Cir.1983)) (internal quotation marks omitted).

FN34. Beller & Keller v. Tyler, 120 F.3d 21, 23 (2d Cir.1997); Kotlicky v. United States Fidelity & Guar. Co., 817 F.2d 6, 9 (2d Cir.1987).

FN35. American Alliance Ins. Co., 92 F.3d at 61.

FN36. Precisely the same analysis would warrant further consideration of the question whether to vacate the monetary awards against Gold Center and Oro-Uno hi the Guess case had the pending appeal not ousted this Court of jurisdiction. These defendants may wish to move the Court of Appeals to remand to this Court to permit it to do so. See Winter v. Cerro Gordo Co. Conservation Board, 925 F.2d 1069, 1073 (8th Cir.1991); Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, 601 F.2d 39 (1st Cir.1979).

FN37. Tr., Jan. 16, 1998, at 5.

FN38. American Alliance Ins. Co., 92 F.3d at 59 (quoting Davis v. Musler, 713 F.2d 907, 915 (2nd Cir.1983)) (internal quotation marks omitted).

FN39. Id. at 61.

FN40. Amirianfar Decl. p 1.

FN41. This is undisputed. Tr., Jan. 16, 1998, at 32.

FN42. Amirianfar produced the notice of deposition at the hearing. DX D; Tr., Jan. 16, 1998, at 21-22.

FN43. PX 7, at 3.

FN44. PX 7, at 3-4.

FN45. Id. at 7.

FN46. Amirianfar Decl. pp 4-5.

FN47. Id. p 8.

FN48. Id. 9.

FN49. Tr., Jan. 16, 1998, at 18.

FN50. Id. at 24-25.

FN51. Id. at 31-33, 57.

FN52. Id. at 34-36.

FN53. Id. at 36-37, 53.

FN54. Id. at 53.

FN55. Id. at 53-54.

FN56. American Alliance Ins. Co., 92 F.3d at 59.

No. 98-828

Supreme Court, U.S.
FILED
DEC 17 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HOME BOY 2000,

Petitioner,

—v.—

GUESS?, INC., GUCCI AMERICA, INCORPORATED, and BIG TIME JEWELRY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT GUESS?, INC. IN OPPOSITION

MILTON SPRINGUT
Counsel of Record
KALOW, SPRINGUT & BRESSLER, LLP
488 Madison Avenue
New York, New York 10022
(212) 813-1600

Attorneys for Respondent Guess?, Inc.

Counter Statement of Questions Presented

Since Petitioner Home Boy 2000 ("Home Boy") materially mischaracterizes the nature of the Second Circuit's decision upon which a writ of certiorari is sought, Guess? Inc. ("Guess?") respectfully restates the questions presented as follows:

Whether the Second Circuit's reversal of the lower court on the sole legal ground that it misapplied governing Second Circuit precedent on the standards for vacating a judgment pursuant to Fed. R. Civ. P. 60(b)(1) is of significant importance to warrant this Court's review?

Whether there is a split in the Circuits supporting this Court's granting of the Petition?

Supplemental Statement of the Parties

Pursuant to Rule 29(6), Guess? certifies that it has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

Table of Authorities iv

Summary of Argument 1

Counter-Statement of the Case 2

A. Proceedings in the Trial Court 2

B. The Appellate Court Decision 3

Reasons for Denying the Writ 5

POINT I

THE APPELLATE COURT'S DECISION WAS AN UNEXCEPTIONAL INTERPRETATION OF A FEDERAL RULE OF INSUFFICIENT IMPORTANCE TO GRANT REVIEW OF ITS DECISION 5

POINT II

THERE IS NO SPLIT IN THE CIRCUITS SUFFICIENT TO JUSTIFY REVIEW 6

Conclusion 8

TABLE OF AUTHORITIES

Federal Cases PAGE

American Alliance Ins. Co. v. Eagle Ins. Co., 92 F.3d 57 (2nd Cir. 1996) 3, 5

Gucci America Inc. v. Gold Center Jewelry, 158 F.3d 631, 1998 U.S. App. LEXIS 24488 (2nd Cir. 1998) 3, 4, 5

Gucci America Inc. v. Gold Center Jewelry, 997 F. Supp. 399 (S.D.N.Y.), *amended sub nom. Guess?, Inc. v. Gold Center Jewelry*, 997 F. Supp. 409 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded*, 158 F.3d 631 (2nd Cir. 1998) 3, 8

Pioneer Investment Services v. Brunswick Assoc. Ltd Partnership, 507 U.S. 380 (1993) 6, 7, 8

Robb v. Norfolk & Western Ry. Co., 122 F.3d 354 (7th Cir.), *reh'g en banc denied*, 1997 U.S. App. LEXIS 24819 (7th Cir. 1997) 6, 7, 8

United States v. Hooper, 9 F.3d 257 (2d Cir. 1993) ... 7

Federal Statutes

The Trademark Act of 1946, § 1051 et. seq. 2

Federal Rules

Fed. R. Civ. P. 60(b) 1-6

Miscellaneous

12 J.W. Moore, *Moore's Federal Practice* (3rd ed. 1997) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-828

HOME BOY 2000,

Petitioner,

—v.—

GUESS?, INC., GUCCI AMERICA, INCORPORATED, and BIG TIME JEWELRY,

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENT GUESS?, INC. IN OPPOSITION

Summary of Argument

Guess? respectfully requests that Home Boy's petition for a writ of certiorari be denied. Throughout its Petition, Home Boy emphasizes that the appellate court erred in failing to give proper cognizance of the equities of the case, and thereby abused its discretion in doing so.

This mischaracterizes the ground upon which the appellate court reversed the district court. The Second Circuit did not hold that the district court abused its discretion under Fed. R. Civ. P. 60(b) in vacating the judgment. Rather, the appellate

court properly performed a *de novo* review of the law applied by the district court, and reversed on the ground that the trial court misapplied governing law. The decision applied the plain language of the Rule, clearly not presenting a substantial question worthy of this Court's review.

Second, Home Boy finds a split in the Circuits where there is none. Only by mischaracterizing the decisions relied upon is an artificial 'split' created among these decisions.

Counter-Statement of the Case

A. Proceedings in the Trial Court

The facts relevant to this Petition are simple: Home Boy was served with a complaint alleging counterfeiting violations of the Trademark Act of 1946, § 1051 et. seq., in particular, §§ 1114(1) and 1125(a), and violations of common law trademark infringement and unfair competition. Home Boy defaulted. The district court entered a default judgment including a permanent injunction against Home Boy, and granted Guess? the right to conduct discovery relating to damages and thereafter to submit a brief in support of the damages requested. Guess?'s brief, exceeding 200 pages (including exhibits), was served on Home Boy, and again Home Boy failed to respond. The district court granted Guess?'s damages request, and subsequently authorized Guess? to execute on the monetary portion of the judgment.

Only after Home Boy's assets were seized in satisfaction of the judgment did Home Boy appear, through counsel, seeking to vacate the monetary provisions of the judgment pursuant to Fed. R. Civ. P. 60(b)(1). After hearing Home Boy's motion, the trial court found that Home Boy's principal:

> deliberately and willfully defaulted in this action, and, moreover, deliberately obstructed its progress at the depositions [on damages]. Although he has not sought to reopen the default as to liability and injunctive relief,

> this finding would have led the Court to deny any such application.

Gucci America Inc. v. Gold Center Jewelry, 997 F. Supp. 399, 408 (S.D.N.Y.), *amended sub nom. Guess?, Inc. v. Gold Center Jewelry*, 997 F. Supp. 409 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded*, 158 F.3d 631 (2nd Cir. 1998).

As to the damages granted, however, the trial court vacated that aspect of the default judgment. The court reasoned:

> [Home Boy's principal] concededly was served with the [damages brief] and *ignored it*. As a legal matter, he was on notice of the relief sought against him. Having considered his demeanor and all of the evidence of this case, however, the Court is not persuaded that his failure to respond to that application was the product of *bad faith*. And while it was *deliberate* in the sense that [Home Boy's principal] *made a conscious decision to pay no attention to it and not to seek legal advice*, the Court is satisfied that this was more a product of *stupidity* than of *malice*.

997 F. Supp. at 409 (emphasis added).

B. The Appellate Court Decision

The Second Circuit reversed the lower court's decision insofar as it erred in granting Home Boy's motion to vacate the damages award, and remanded the case to reinstate the award originally granted Guess?. 158 F.3d 631, 1998 U.S. App. LEXIS 24488 (2nd Cir. 1998).

The basis for the appellate court's decision was that the district court misapplied the test set out in *American Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57 (2nd Cir. 1996), its leading decision analyzing the appropriate standards for vacating a default pursuant to Rule 60(b)(1), by incorporating a bad faith requirement into wilfulness. According to the appellate court, *American Alliance* prohibits the vacatur of a default

judgment when the defaulting party acts willfully without regard to whether the defaulting party acted in bad faith. In its ruling, the appellate court stated:

> It seems to us clear that the analysis in *American Alliance* did not intend to suggest that a finding of bad faith is a necessary predicate to concluding that a defendant acted "willfully" for purposes of Rule 60(b)(1). Instead, we merely sought to contrast defaults caused by negligence, which in some cases may be excusable, with defaults resulting from deliberate conduct, which are not excusable. . . . Thus, while a determination that the defendant acted in bad faith would certainly support a finding of "willfulness," it is sufficient that the defendant defaulted deliberately. . . .
>
> Since the trial court here incorrectly required bad faith as a predicate to a determination of willfulness and since the record reflects that Home Boy . . . deliberately and intentionally allowed [a] default judgment[ ] to enter against [it], we reverse and order reinstatement of the original monetary judgment[ ].

158 F.3d 631, __, 1998 U.S. App. LEXIS 24488, **11-13 (citations omitted).

In short, predicating its decision on the trial court's own findings, the judgment was reversed because of the trial court's misapplication of the law.

Reasons for Denying the Writ

POINT I

THE APPELLATE COURT'S DECISION WAS AN UNEXCEPTIONAL INTERPRETATION OF A FEDERAL RULE OF INSUFFICIENT IMPORTANCE TO GRANT REVIEW OF ITS DECISION

The gravamen of Home Boy's Petition is that the Second Circuit "abused its discretion" in reversing the trial court's decision. *See, e.g.* Petitioner's Brief, at 2 ("The Second Circuit's decision holds that the District Court abused its discretion by granting equitable relief . . ."); *id.* at 7 ("While defaults should certainly not be encouraged, fundamental principles of fairness dictate that the accepted and usual course of judicial proceedings be that District Court judges deal with default judgments as discretionary matters.")

This is a mischaracterization of the appellate court's holding. The Second Circuit held that, as a matter of law, the district court misapplied the test set out in *American Alliance Ins. Co. v. Eagle Ins. Co.*, 92 F.3d 57 (2nd Cir. 1996): "A district court's grant or denial under Rule 60(b), unless rooted in an error of law, may be reversed only for an abuse of discretion. . . . *We conclude that the decision here involved an error of law.*" 158 F.3d 631, __, 1998 U.S. App. LEXIS 24488, *9 (2nd Cir. 1998) (emphasis added; quotations and citations omitted).

The Second Circuit thus merely followed the plain wording of Fed. R. Civ. P. 60(b)(1), which allows a court to vacate a judgment because of "mistake . . . or excusable neglect," unexceptionally holding that a deliberate and willful default does not constitute a "mistake" or "excusable neglect"—a holding not only consistent with the plain wording of the Rule, but a holding consistent with all courts' long-standing interpretation of the Rule. *See generally* 12 J.W. Moore,

Moore's Federal Practice §§ 60.41[1][c][i] & n.13 (3rd ed. 1998) ("Deliberate or willful conduct is never mistake or excusable neglect"; cases collected).

In short, the Second Circuit's ruling—a straightforward and plain reading of Fed. R. Civ. P. 60(b)(1)—does not create a significant legal issue worthy of this Court's consideration.

POINT II

THERE IS NO SPLIT IN THE CIRCUITS SUFFICIENT TO JUSTIFY REVIEW

Home Boy's argument that there is a split in the Circuits is erroneous.

Home Boy relies upon a Seventh Circuit decision, *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354 (7th Cir.), *reh'g en banc denied*, 1997 U.S. App. LEXIS 24819 (7th Cir. 1997), for the proposition that *Robb* conflicts with the Second Circuit's decision. It does not.

In the first instance, Petitioner (at page 8) quotes *Robb*'s statement that "District Court judges [have] '*discretion* to consider the equities to determine whether . . . negligence is (or is not) excusable neglect.' " 122 F.3d at 359 (emphasis in original). But this statement is entirely in accord with the Second Circuit's decision, which, as quoted above, recognizes the discretion of the trial court in addressing Rule 60(b)(1) applications. As well, the issue before the Second Circuit was *not* whether "negligence" constitutes "excusable neglect," but rather whether a lack of bad faith excuses willful, deliberate defaults.

Further undercutting Home Boy's position, the *Robb* decision *itself* stated, "By following *Pioneer* [507 U.S. 380 (1993), discussed directly below] in a clear and straightforward fashion, we join the other circuits that acknowledge 'excusable neglect' has a new and broader meaning in the

aftermath of the Supreme Court's 1993 decision. See . . . *United States v. Hooper*, 9 F.3d 257, 258 (2nd Cir. 1993) . . ." *Robb*, 122 F.3d at 361-62. The Seventh Circuit thus expressly indicated that it was in *agreement*, not in conflict, with Second Circuit law.

Finally, in an effort to demonstrate that the Second Circuit's decision is in conflict with this Court's *Pioneer* decision, Home Boy, once again relying upon its erroneous emphasis on abuse of discretion, states:

> This Court's decision in the *Pioneer* case strongly indicates that the decision to vacate a default under Fed. R. Civ. P. 60 is particularly discretionary and that such discretion includes consideration of any equity created by the default and resulting judgment, even if "a party may *choose* to miss a deadline." 507 U.S. at 388.

Petitioner's Brief, at 8 (emphasis not in original).

This isolated quotation from *Pioneer* is misleading. What this Court said was:

> There is, of course, a range of explanations for a party's failure to comply with a court ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforseen human intervention. *At the other, a party simply may choose to flout a deadline.* In between lie cases where a party may choose to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence.

507 U.S. at 387-88 (emphasis added).

Nothing in this Court's discussion supports the proposition that the Second Circuit "took the exact opposite approach." Petitioner's Brief, at 8. The district court's own findings—

uncontested on appeal—was that the Petitioner "ignored" the brief on damages served on him, and "made a conscious decision to pay no attention to it and not to seek legal advice." 997 F. Supp. at 409. Indeed, the district court's findings, undisturbed on appeal, support the conclusion that Home Boy "simply . . . [chose] to flout a deadline." *Pioneer*, 507 U.S. at 388.

Yet again, Petitioner conflates the standards for appellate review: the Second Circuit did not hold that the district court abused its discretion in vacating the judgment; rather, it held that it misapplied the law—law which is entirely consistent with *Pioneer* and *Robb*.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MILTON SPRINGUT
Counsel of Record
KALOW, SPRINGUT & BRESSLER LLP
488 Madison Avenue
New York, New York 10022
(212) 813-1600

Attorneys for Respondent
Guess?, Inc.

Of Counsel:

ROBERT TILEWICK
MICHAEL SHIH
KALOW, SPRINGUT & BRESSLER LLP
488 Madison Avenue
New York, New York 10022
(212) 813-1600